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REPORT ON RECENT ETS AND IAQ DEVELOPMENTS

January 21, 1994

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REPORT ON RECENT ETS AND IAQ DEVELOPMENTS

IN THE UNITED STATES

REGULATORY AND LEGISLATIVE MATTERS

U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

[1] OSHA Poised to Take Action on ETS

OSHA has reportedly drafted a *Federal Register* notice that would schedule meeting dates in late January or February 1994 to solicit public comments on OSHA's ETS rulemaking options. The notice, as drafted, is reportedly an announcement of a three-day "town meeting" to provide OSHA with information prior to reaching a decision on whether to move forward with a separate rulemaking on ETS or a broader indoor air quality rule.

According to OSHA officials, the meetings would be designed more to serve as a "litmus test of the political atmosphere" than as a forum for scientific debate. Labor Department and OSHA officials have reportedly suggested that the town meeting proposal was made by Labor Secretary Robert Reich.

An additional indication that OSHA is prepared to act on ETS came from Assistant Secretary of OSHA Joseph Dear who was quoted in a press report as saying, "The Department of Labor is going to address the issue of indoor air quality and second-hand smoke this quarter."

In a recent letter to Dear, the AFL-CIO reportedly said it believes IAQ to be one of the top five risks to public health. The letter, signed by 16 unions, reportedly states, "We respectfully suggest to the extent OSHA believes it necessary and appropriate to develop regulations on ETS, that the most suitable context in which to develop these regulations would be as part of a comprehensive standard addressing the whole of indoor air quality, and ETS would needlessly delay action on one or both of the regulations." An AFL-CIO official reportedly said that if OSHA develops a separate ETS standard, agency inspectors would become little more than "smoking cops." Peg Seminario, AFL-CIO director of occupational safety and health has said she believes the issue of ETS may be a matter of public health to be regulated by EPA, rather than an occupational safety and health issue.

A special published report on OSHA in the *Occupational Safety & Health Reporter* discussed ETS as a rulemaking challenge for OSHA in 1994. The report cites the EPA Risk Assessment on ETS and notes that OSHA is under pressure from a number of public interest groups and various health and occupational medicine associations to regulate or ban ETS in the workplace. Also noted are the pending legislative initiatives in Congress that would give jurisdiction over the issue to the EPA. A Labor Department attorney is quoted in the article saying, "I think we could ban [ETS]. Smoking is not an adjunct to an industrial process, except, perhaps it could be argued, in restaurants and bars. These are some of the concerns, but they are not insurmountable."

In a related matter, according to a draft version of OSHA's proposed agenda for 1994, a preliminary proposal on indoor air contaminants is slated for publication at any time. OSHA expects to have a rulemaking plan for updating its air contaminants standard sometime between April and June 1994. This initiative is intended to remedy a July 1992 federal court decision invalidating OSHA's previous attempt to set exposure limits on hundreds of substances. *See Occupational Safety and Health Reporter*, January 12, 1994; *The Washington Post*, January 16, 1994; and BNA *Daily Labor Report*, January 5, 1994.

[2] *ASH v. OSHA*: Oral Argument Scheduled; Briefing Schedule Set

ASH's petition for review has been scheduled for oral argument on May 16, 1994. ASH will be required to file its brief on February 9, 1994, and OSHA will be required to file its response on March 11, 1994. Final briefs must be filed by April 15, 1994.

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ASH filed this action in December 1992, seeking an order that would require OSHA to institute a separate rulemaking to regulate ETS in the workplace. OSHA's motion to dismiss was denied in May 1993, and a mediator failed in an attempt to resolve the dispute through alternative dispute resolution in December 1993. *ASH v. Department of Labor*, No. 92-1661 (U.S. Court of Appeals, D.C. Circuit) (filed December 22, 1992).

[3] "Point, Counterpoint," B. Dawson & J. Banzhaf, *Indoor Pollution News*, January 7, 1994

These two opinion pieces by the vice president of the Tobacco Institute (TI) and the executive director of ASH address whether OSHA should regulate ETS. On behalf of TI, Brennan Dawson argues that the scientific evidence will not support a determination by OSHA that ETS is capable of causing material health impairment and that ETS levels in the workplace pose a significant risk to health. Dawson also discusses "the importance of proper ventilation in addressing indoor air quality problems."

John Banzhaf, on behalf of ASH, cites the EPA Risk Assessment on ETS to support his claim that "ETS has definitely been shown to cause cancer in human beings, and that there is no safe level below which it has been shown not to cause cancer." Banzhaf calls upon OSHA to protect workers from ETS exposure. He writes, "OSHA has a legal duty to protect workers from exposure to hazardous, especially carcinogenic chemicals."

[4] Reich Endorses Major Elements of OSHA Reform Legislation

Labor Secretary Robert Reich, writing on behalf of the Clinton administration, has sent a letter of endorsement to the primary sponsors of OSHA reform legislation in the House and the Senate. Both sponsors -- Massachusetts Senator Edward Kennedy and Michigan Representative William Ford -- are Democrats. The endorsement prompted a critical response from the business community, which intends to fight efforts to enact the Democratic version of OSHA reform legislation.

Evidently, the administration's views are essentially the same as those contained in a draft document released to the press in early December 1993. Further details about the draft appear in issue 62 of this Report, December 17, 1993. While many key elements of the reform legislation were endorsed by Reich, he did say that changes appear to be needed on a number of matters, including procedural issues relating to the issuing of safety and health standards. Reich is apparently expected to testify before the Senate Labor and Human Resources Committee shortly after Congress reconvenes on January 25, 1994.

Joseph Dear, Assistant Secretary of Labor in charge of OSHA, will reportedly testify on the OSHA reform legislation before the House Education and Labor Committee, which is expected to vote on the bill sometime in February 1994. *See* BNA *Daily Labor Report*, January 12, 1994; BNA *Employment Policy & Law Daily*, January 18, 1994.

[5] Educational Materials on TB to Reach Field Offices

OSHA's Training Institute has reportedly begun sending educational materials on tuberculosis (TB) to OSHA's regional and area offices. The materials are part of OSHA's outreach program to ensure the OSHA inspectors and officials understand procedures that can protect workers from contracting TB. Among the materials is information related to engineering controls and respiratory protection. Although OSHA does not have a TB standard, the agency did adopt a TB enforcement policy under the general duty clause of the Occupational Safety and Health Act for employers in health care settings, prisons, homeless shelters, long-term care facilities for the elderly, and drug treatment centers. *See Occupational Safety & Health Reporter*, January 5, 1994.

Meanwhile, the coalition of labor unions that petitioned OSHA to adopt a rule to protect workers from TB is still reportedly awaiting a response from OSHA. The group was evidently told by OSHA in October 1993 that the agency was reviewing the petition. The agency's regulatory agenda indicates that OSHA intends to publish a TB proposal by the end of 1994. According to a press report, OSHA's efforts in this regard are dependent upon the Centers for Disease Control and Prevention finalizing new guidelines to prevent TB transmission among workers in high-risk industries. *See Occupational Safety & Health Reporter*, January 12, 1994.

In a related matter, the National Institute for Occupational Safety and Health (NIOSH) has reported after

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an investigation that workers at the District of Columbia Board of Parole and six regional hospitals in Puerto Rico may have an added risk of TB infection because of poor ventilation in the buildings where they work. NIOSH has reportedly recommended that the facilities upgrade their ventilation systems to meet ASHRAE standards or develop routine maintenance programs for all ventilation systems. *See Occupational Safety & Health Reporter*, January 5, 1994.

[6] California OSHA Considers Drafting Comprehensive Indoor Air Quality Standard

According to a press report, the chief of California's Division of Occupational Safety and Health (Cal/OSHA) has announced that the agency may draft a comprehensive IAQ standard or may update existing standards in order to effectively deal with IAQ complaints. The announcement was made at an advisory committee meeting on January 6, 1994.

The issue apparently arose in response to a Cal/OSHA draft policy statement on IAQ for field inspectors to follow in the investigation of IAQ complaints in the workplace. Further details about the statement appear in issue 60 of this Report, November 19, 1993. Under the proposed policy, complaints about ETS, pesticide exposure, radiation, outdoor air quality and natural gases will be referred to other government agencies. Complaints about malfunctioning HVAC systems, dust or other airborne debris, or uncomfortable temperatures will not apparently be deemed serious. DOSH will, however, consider as serious IAQ-related complaints about Legionnaire's disease, humidifier fever, asthma, cancer, or adverse birth outcome. *See* BNA *Occupational Safety & Health Daily*, January 18, 1994.

[7] Workplace Smoking Policy May Be Adopted in Maryland

According to the Maryland Secretary of Licensing and Regulation, a regulation that would have originally banned smoking in the workplace, but may be revised to allow smoking in designated areas, could be issued as early as February 1994. Secretary William Fogle, Jr., reportedly predicted that the state's Occupational Safety and Health Advisory Board would recommend approval of the proposal he unveiled in November 1993, and that a regulation would be promulgated shortly thereafter. Another meeting on the regulation may be held as early as February 2, 1994.

A general assembly review committee will reportedly conduct a final review of the proposal in late January 1994, but, according to Fogle, the committee's recommendation is not "binding." Once the advisory board recommends to the state Department of Labor and Industries that the ban be approved, it will be reported to Fogle for his approval. *See* BNA *Daily Labor Report*, January 4, 1994.

U.S. Surgeon General

[8] Surgeon General Report Anniversary Sparks Calls for ETS Regulation

Seven present and former U.S. Surgeons General, in conjunction with a coalition of health groups, commemorated the 30th anniversary of the Surgeon General's 1964 report on smoking and health by calling for bans on smoking in workplaces, in all federal buildings and on international flights. The coalition apparently issued what it called a "report card" that graded government agencies and the executive and legislative branches for the steps taken during the last 30 years to curtail tobacco use. The best grade, a B+, was given to EPA for its Risk Assessment on ETS. The Department of Veterans Affairs reportedly received a B grade for banning smoking in its hospitals. But the coalition reportedly gave nine of eleven government agencies a D or F, the two lowest grades in the U.S. grading system. The coalition criticized OSHA for not acting to protect workers from ETS. The agency was reportedly urged to promulgate a total ban on workplace smoking that would cover nearly all industries and would provide no exemptions. *See The New York Times*, *The Philadelphia Inquirer*, BNA *Occupational Safety & Health Daily*, January 12, 1994; *The Washington Post*, January 11, 1994.

U.S. Environmental Protection Agency (EPA)

[9] National Research Council Recommends Reform of EPA Risk Assessment Practices

In a report released on January 19, 1994, the National Research Council advises EPA "to provide

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greater disclosure of uncertainties" in their risk assessments, according to a news account. In particular, the report counsels the agency to (i) refrain from conducting expansive risk assessments for chemicals that do not pose significant health risks; (ii) clarify the criteria for using protective estimates known as "default assumptions"; (iii) discuss uncertainties more openly; and (iv) identify data gaps in order to spur public and private research.

A participant on the panel that drafted the report was quoted as calling the recommendations "evolution and refinement" as opposed to "major surgery." The name of the report is "Science and Judgment in Risk Assessment." *See National Journal's Congress Daily*, January 19, 1994.

A copy of the report was not immediately available, in part because of the severe winter weather in Washington, D.C.

[10] SAB Chair Urges Early Board Involvement in Regulatory Initiatives

EPA Science Advisory Board (SAB) chair Genevieve Matanoski has reportedly urged the SAB to become involved as early as possible in reviewing the science underlying EPA regulatory activities. Her recommendation is apparently being made in response to criticisms about EPA science by the regulated community. Matanoski is quoted as saying that, if the SAB "could somewhere along the line give concrete suggestions, [EPA] could bypass some of the problems we often face in the end."

According to a press report, Matanoski supports moving ahead with the recommendations made in the 1992 "Credible Science--Credible Decisions" report. EPA is evidently starting to implement a thorough peer review policy in response to the report, an initiative praised by Matanoski. She also cheered the creation of the science advisor position now held by William Raub. Matanoski has reportedly voluntarily joined the environmental futures committee which will assess social and economic trends that will drive future environmental policy. *See Inside EPA*, January 7, 1994.

[11] Browner Names Members of New Science Policy Council

EPA Administrator Carol Browner has reportedly announced who will serve on the Science Policy Council, a newly created EPA entity that will identify and address scientific issues across agency programs to foster a more integrated approach to the resolution of such issues. EPA deputy administrator Robert Sussman will chair the Council, and assistant administrator Lynn Goldman will serve as vice-chair. Browner's Science Advisor, William Raub, has also reportedly been named to serve on the Council.

One of the first tasks of the Council will be to designate a steering committee of career scientists. Raub will, as noted in issue 62 of this Report, December 17, 1993, chair the steering committee, which will apparently (i) assess science policy needs, (ii) plan for meetings, (iii) resolve issues not in need of the Council's attention, and (iv) oversee and evaluate the success of programs and regions in implementing new and existing agency science policies. According to EPA sources, the creation of the Council and its steering committee underscores Browner's stated goal of improving the agency's scientific work. *See Inside EPA*, January 14, 1994.

[12] IAQ Report to be Considered at SAB Meeting

EPA's Science Advisory Board (SAB) will hold an open executive committee meeting on January 27-28, 1994. Among the committee reports that will be considered during this meeting is the "Review of Indoor Air Quality Research Program" of the SAB's Indoor Air Quality Committee. The Executive Committee will also be briefed about the status of the SAB's Environmental Futures Project. Further details about this project appear in issue 62 of this Report, December 17, 1993. *See Federal Register*, January 4, 1994.

WHITE HOUSE

[13] Clinton Administration to Oppose Insecticide Use on Aircraft

According to a press report, the Clinton administration will begin taking steps to discourage foreign governments from requiring airlines to spray the cabins of arriving aircraft with insecticide while the ventilation is turned off. Such spraying is apparently required 30 minutes before landing by some 21 governments in the Caribbean, Latin America and the South Pacific.

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According to EPA, the spraying can create medical problems for individuals with allergies, chemical sensitivities, asthma and other respiratory problems. A newspaper article states that travelers have complained that the spraying causes headaches, nausea, fatigue, seizures, memory loss and a depressed immune system. Federal investigators are reportedly trying to determine if insecticides are the cause of these problems.

Transportation Secretary Federico Pena reportedly plans to direct U.S. airlines to inform passengers before they book their flights that their aircraft will be sprayed prior to landing. It is hoped that this action will permit passengers to make an informed decision about boarding and may persuade some governments to end the practice. More direct measures will also reportedly be considered.

EPA officials said that complaints from flight attendants and passengers prompted renewed interest in the issue. The United States ended spraying in passenger cabins of arriving airlines in 1979, after determining that any benefits were outweighed by threats to health. *See The Miami Herald*, January 18, 1994.

103D CONGRESS

[14] Smoke-Free Environment Act to Hold Hearings

Introduced by Representative Henry Waxman (D-Cal.) in November 1993, the Smoke-Free Environment Act of 1993 (H.R. 3434) may be scheduled for hearings in Congress as early as February 6 and 7, 1994. The bill would restrict smoking to separately ventilated areas of nearly every building in the United States. Where separately ventilated areas do not exist, smoking would be prohibited indoors and within the immediate vicinity of the entrance to the facility. The measure would amend the Public Health Service Act.

Congress is currently in recess and is expected to resume on January 25, 1993.

[15] Smoking Cessation Program Offered to House Members and Staffers

According to a press report, an American Lung Association smoking cessation program is being offered to House members and staffers who are being affected by the 1993 policy prohibiting smoking in all public areas of the House. The program is reportedly being offered free of charge by the House Office of Employee Assistance. *See Roll Call*, January 6, 1994.

OTHER U.S. AGENCIES

[16] Memorandum of Understanding to Coordinate Enforcement Activities

According to a press report, the National Labor Relations Board (NLRB) and the Equal Employment Opportunities Commission (EEOC) have approved a Memorandum of Understanding, which will establish a procedure for coordinating enforcement of the Americans with Disabilities Act (ADA) in the workplace. The agencies will share information regarding employment policies and practices and will consult each other when an investigation reveals that the applicability of the ADA or the National Labor Relations Act is in question. *See Americans With Disabilities Act, Practice and Compliance Manual*, January 1994.

A number of antismoking advocates, including ASH, have stated that the ADA will be used by individuals allegedly disabled by ETS exposure to force employers and the owners of places of public accommodation to ban smoking or face charges of discrimination. In this regard, *see* issues 41 and 46 of this Report, February 19 and April 30, 1993.

[17] Funding Cuts to Affect IAQ Programs

OMB has reportedly given the Consumer Product Safety Commission (CPSC) a fiscal 1995 budget mark that is $3.1 million below the agency's current operations level. An appeal by the CPSC chair to the OMB to restore the funds was apparently unsuccessful. Accordingly, the CPSC is preparing a budget that will, among other matters, delete projects on indoor air quality from its Hazard Assessment and Reduction program. *See* BNA *Product Liability Daily*, January 11, 1994.

STATE AND LOCAL GOVERNMENTS

[18] Health Coalition Cites Florida for Tough Tobacco Control Measures; Calls for More Action

In connection with the 30-year anniversary of the 1964 Surgeon General's Report on smoking and health, the Florida Tri-Agency Coalition on Smoking

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OR Health has reportedly praised the state of Florida for a number of antismoking initiatives. The Coalition, made up of the American Cancer Society, the American Heart Association and the American Lung Association, apparently ranked Florida higher than the federal government for taking action on what it calls the "tobacco problem."

Particularly cited by the Coalition was the passage and amendments to the Florida Clean Indoor Air Act, which restricts smoking in many public places. The Coalition will reportedly seek further amendments of the Act to completely ban smoking in restaurants. The Coalition is also apparently calling upon the Legislature to ban smoking in public places, "especially places where children are at risk." *See PR Newswire*, January 11, 1994.

ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

[19] *Bluitt*: Proposed Order Granting Defendants' Motion to Transfer Venue Signed

On January 5, 1994, U.S. District Judge Robert Parker signed the agreed order granting the parties' motion to transfer venue to the Dallas Division of the Northern District of Texas from the Tyler Division of the Eastern District.

Plaintiffs in this action allege Willie Ruth Bluitt was a nonsmoker who died of lung cancer as a result of her workplace exposure to environmental tobacco smoke. Defendants in the action are the six major U.S. cigarette manufacturers. *Bluitt v. R.J. Reynolds Tobacco Co., et al.* (U.S. District Court, Northern District, Texas) (filed August 30, 1993).

[20] *Broin*: Reynolds Files Motion to Dismiss

On January 11, 1994, R.J. Reynolds Tobacco Co. filed a motion to dismiss or strike plaintiffs' second amended complaint. The company was added as a defendant to the case during December, in return for the dismissal of non-manufacturing Reynolds entities that had been named in the complaints.

At issue in this case are the claims of 28 flight attendants allegedly injured by occupational exposure to ETS. In addition, the husband of one of the flight attendants claims loss of consortium. The 28 attendants purport to represent a class of approximately 60,000 other attendants. Plaintiffs' class action allegations have been dismissed by the trial court; plaintiffs' appeal of that dismissal is pending in the Florida Court of Appeal.

Injuries alleged by the putative class representatives include lung cancer, breast cancer and unspecified respiratory ailments. Plaintiffs further allege that occupational exposure to ETS on board aircraft causes at least 22 diseases and a reasonable fear of contracting such diseases. The defendants are the six major U.S. cigarette manufacturers (plus related entities), UST, Inc., United States Tobacco Company, Dosal Tobacco Corp., the Council for Tobacco Research, The Tobacco Institute, and three trade associations. *Broin, et al. v. Philip Morris, et al.* (Circuit Court, Dade County, Florida) (filed October 31, 1991).

[21] *Butler*: Defendants' Motion for Summary Judgment Granted in Part

On January 5, 1994, Judge Robert Gibbs granted in part defendants' motion for partial summary judgment, holding that plaintiffs' failure to warn claims accruing after 1969 are preempted by the Federal Cigarette Labeling and Advertising Act. Judge Gibbs otherwise denied the defendants' motion.

Plaintiffs contend that Burl Butler, a barber from Laurel, Mississippi, developed lung cancer as a result of his workplace exposure to environmental tobacco smoke. The defendants in this case consist of the six major U.S. cigarette manufacturers and several local retailers. *Butler v. R.J. Reynolds Tobacco Company, et al.* (Circuit Court, Hinds County, Mississippi) (filed October 21, 1992).

[22] *Dunn*: Appeals Sought of December 29, 1993, Rulings

On January 12, 1994, the defendants filed pleadings to initiate appeals of the court's December 29, 1993, rulings. The manufacturing defendants, The Tobacco Institute, and the Council for Tobacco Research filed a praecipe with the trial court for preparation and certification of the record of proceedings relating to the court's order denying their motion to dismiss and motion to transfer venue. American Brands, Liggett & Myers, Loews Corporation and RJR Nabisco Holdings

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Corporation filed a motion on January 12 asking the court to certify for appeal its orders denying their individual motions to dismiss the complaint for lack of jurisdiction. Plaintiffs submitted an opposition to the latter motion on January 18.

On January 12, the defendants filed a joint motion to defer the filing of their answers to plaintiffs' complaint pending rulings by the Indiana Courts of Appeal in their various appeals. The court denied this motion on January 19, but granted defendants until January 31 to file their answers.

Plaintiffs in this case contend that Mildred Wiley was a nonsmoker who died of lung cancer as a result of workplace exposure to environmental tobacco smoke. Her husband, Philip Wiley, is also asserting a loss of consortium claim. Defendants in the case are each of the six major U.S. cigarette manufacturers, parent companies of three of the manufacturers, The Tobacco Institute, and the Council for Tobacco Research. *Dunn v. RJR Nabisco Holdings Corporation, et al.* (Superior Court, Delaware County, Indiana) (filed May 28, 1993).

[23] *Schultz*: Plaintiff Did Not File a Petition for Writ of Certiorari

Plaintiff Greg Schultz did not file a petition for writ of certiorari with the U.S. Supreme Court by the deadline of January 3, 1994. Mr. Schultz had the option of seeking review of the October 5, 1993, ruling by the Ninth Circuit Court of Appeals that affirmed a trial court judgment in favor of Philip Morris. That ruling extinguished the last of Mr. Schultz's cases against cigarette manufacturers. *Schultz v. Philip Morris, et al.* (United States Court of Appeals for the Ninth Circuit) (filed August 31, 1990).

The action was one of several *pro se* lawsuits against cigarette manufacturers in which Schultz claimed injury from ETS exposure in prison.

ETS/IAQ LITIGATION NOT INVOLVING CIGARETTE MANUFACTURERS

WORKPLACE: HANDICAP DISCRIMINATION

[24] *Gupton v. Commonwealth of Virginia*, 1994 U.S. App. LEXIS 514 (U.S. Court of Appeals, Fourth Circuit) (decided January 13, 1994)

The Fourth Circuit Court of Appeals has rejected the claim of a Virginia Department of Transportation employee that she is a handicapped individual due to an alleged allergy to ETS and therefore entitled to protection from discrimination under the Rehabilitation Act. The claimant, Betty Gupton, had filed a claim against Virginia and two of her superiors, claiming that their failure to provide her with a smoke-free work environment violated her constitutional and Rehabilitation Act rights. The employer had attempted to accommodate Gupton by placing her in a nonsmoking area and by offering her a job in a smoke-free building.

Gupton claimed she was handicapped, or disabled, because her alleged allergy to ETS was a physical impairment which substantially limited her major life activity of working. To establish this claim, the court determined, Gupton would have to show "not merely that her allergy made her incapable of satisfying the singular demands of a particular job, but that it foreclosed generally her opportunity to obtain the type of employment involved." Because she had not made this showing and, indeed, had failed to respond to the employer's offer of alternative employment, the court held that she was not a handicapped individual and affirmed the decision of the district court dismissing her claim.

The court also affirmed the district court's grant of summary judgment against Gupton on her due process and equal protection claims. With respect to Gupton's argument on this issue, the court said, "We find that this argument is completely without merit, and reject it without further consideration."

In reaching its decision, the court of appeals observed that the district court ruling in *Vickers v. Veterans Administration*, 549 F. Supp. 85 (W.D. Wash. 1982), is no longer good law because its reasoning conflicts with a subsequent Ninth Circuit Court opinion. In *Vickers*, a case often cited by antismoking activists, the

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court determined that an employee who was hypersensitive to ETS qualified as a handicapped person because his hypersensitivity "limited at least one of his major life activities, that is, his capacity to work in an environment which is not completely smoke free."

The *Gupton* court states that the Ninth Circuit has since adopted the rule enunciated in the *Gupton* opinion, i.e., that a limitation on the capacity to work must be shown with respect to a limitation on "employability generally" and not just with respect to a particular job. Thus, the court says, the Ninth Circuit "seems to have effectively overruled [*Vickers*]."

Workplace: IAQ

[25] ***Bahura v. SEW Investors*** **(Superior Court, District of Columbia) (filed September 14, 1990; judgment entered December 23, 1993)**

Judgment has been entered in favor of five EPA employees who had alleged that poor indoor air quality at the EPA's headquarters caused them to suffer a number of health problems. The judgment is based on a jury verdict awarding the plaintiffs a total of $948,000, which includes a loss of consortium award of $28,000 to a sixth plaintiff. Only one plaintiff, Susan Watkins, was found to have actually suffered physical injury. The jury specifically found that the other plaintiffs believed they had been injured (termed "somatization" on the special jury question form), and awarded damages on that basis. Punitive damages were not awarded against any defendant.

The defendants in the case were various entities that owned the building complex known as Waterside Mall and were allegedly responsible for the IAQ conditions existing during renovation work that caused the claimed injuries. They had defended the action on the basis of the statutes of repose and limitations, causation, standing, contributory negligence and assumption of the risk. The defendants had also asserted that the EPA was responsible for the injuries alleged.

There are 14 plaintiffs remaining in the case. The trial involving the six plaintiffs who recovered damages had been bifurcated and was tried as a "test" case. Each plaintiff originally sought $5 million in compensatory damages, while a total of $15 million was sought in punitive damages.

Prisoner Case

[26] ***Thompson v. Haws,*** **1994 U.S. App. LEXIS 72 (U.S. Court of Appeals, Seventh Circuit) (decided January 4, 1994)**

The Seventh Circuit Court of Appeals has dismissed the pro se complaint filed by an Illinois prison inmate who alleged that his Eighth Amendment rights were being violated by his exposure to ETS. The court discusses the U.S. Supreme Court decision in *Helling v. McKinney,* 113 S. Ct. 2475 (1993), but finds that inmate James Thompson's complaint falls short of the allegations required by *Helling.* Thompson acknowledged in his complaint that he could avoid the risk of harm posed by other prisoners and guards smoking by remaining in his cell. Moreover, appended to Thompson's brief on appeal was a document indicating that the prison responded to his ETS complaints by having them reviewed by a medical doctor, who referred Thompson for psychiatric review. The court held that these allegations were insufficient to show that the defendants "either established the conditions to inflict wanton pain or are deliberately indifferent to whether the conditions have these effects."

Prison Smoking Waiver

[27] ***Altieri v. Scott,*** **1994 N.Y. App. Div. LEXIS 128 (Supreme Court of New York, Appellate Division, Second Department) (decided January 10, 1994)**

The court has dismissed a case involving a challenge to the waiver of the smoke-free work area provision of the Clean Indoor Air Act for certain areas of a New York county jail. According to the court, the Dutchess County Commissioner of Health granted the waiver in March 1990, but a trial court annulled the decision in September 1991. The parties informed the court that the county jail is now a smoke-free facility pursuant to an administrative regulation, and the court decided that the matter was not of sufficient importance to warrant invoking an exception to "the doctrine of mootness."

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IAQ: Carpet Emissions

[28] *Loy v. Armstrong World Industries Inc.*, No. 93-2280 (U.S. District Court, Eastern District, Pennsylvania) (dismissed November 15, 1993)

A U.S. District Court dismissed without prejudice the class action claims brought by consumers against a carpet manufacturer for personal injury allegedly due to chemical additives used during the manufacture and installation of residential and commercial carpeting. The claims filed by the Loys had been severed from the class action filed by Carrie Hayes in April 1993, and had not been transferred with Hayes to a Georgia federal court, as were the related claims in *Howell v. Shaw Industries Inc.*, No. 93-CV-321 (U.S. District Court, Northern District, Georgia) (transferred November 8, 1993). Neither the Loys nor defendant Armstrong had sought a change of venue.

The action filed by the Loys was dismissed due to a lack of standing. They had brought a Lanham Act claim against carpet manufacturer Armstrong, and the court determined that the Lanham Act was created to address commercial interests and was not intended to serve as a consumer protection law. The court suggested that the Loys are free to pursue their claims in state court. *See Product Safety & Liability Reporter*, December 24, 1993.

Meanwhile, the plaintiffs in *Howell v. Shaw*, filed a consolidated amended complaint on January 7, 1994. This filing followed a December 29, 1993, status conference before Judge Harold L. Murphy.

LEGAL ISSUES AND DEVELOPMENTS

[29] "Environmental Tobacco Smoke: Cruel and Unusual Punishment?," L.I. Ginestra (student author), *Kansas Law Review*, Vol. 42, 1993

This law review comment explores the issue of ETS exposure in prisons and the cases that culminated in the U.S. Supreme Court decision in *Helling v. McKinney*, 113 S. Ct. 2475 (1993). The author cites both the 1992 draft EPA Risk Assessment on ETS and the final risk assessment released in January 1993. Also discussed is the tobacco industry lawsuit challenging the risk assessment.

The author concludes that prison officials should attempt to reasonably accommodate the needs and concerns of nonsmoking prisoners. "By adopting reasonable smoking restrictions . . . prison officials may be able to show that they were not deliberately indifferent to the dangers ETS exposure poses to prisoners' health," the author writes, "and, as a corollary, may avoid potential civil liability for willfully exposing prisoners to carcinogens."

OTHER DEVELOPMENTS

[30] Airlines Announce Test Smoking Ban on International Flights

On January 10, 1994, United Airlines announced its intention to test a smoking ban on some international flights. The test ban, set to begin on March 1, will affect United's two daily flights between New York and London. The ban will apparently also be tested on United's once daily flight between Los Angeles and Auckland/Melbourne. United also says it plans to introduce smoke-free flights beginning in June between London and the U.S. cities of Los Angeles, Washington, D.C., and San Francisco. United will become the first U.S. airline to ban smoking on any international flight.

Meanwhile, Northwest Airlines has reportedly announced a new nonsmoking policy in all its first class cabins on international flights. Northwest, the first airline in the U.S. to ban smoking on domestic flights, claims its research shows that 70 percent of its international passengers wanted smoke-free cabins. *See Business Wire*, January 10, 1994 and *Associated Press*, January 5, 1994.

[31] Study Estimates Effect of Smoking Bans in State Psychiatric Hospitals

A study of 41 state psychiatric hospitals in 16 states asserts that smoking bans "have been far less disruptive than many staff members anticipated," according to a newspaper article. About 60 percent of the hospitals claimed their ventilation systems "worked more efficiently" after smoking was prohibited, and that the air was cleaner, their facilities smelled better and there were no burns on the furniture or the carpeting, the article said. Some hospitals reported decreases in

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violent incidents and in reports of allergies and other respiratory complaints. *See The Washington Post*, January 11, 1994.

[32] Chrysler Makes Ashtrays Optional

In an announcement that has attracted abundant publicity, the Chrysler Corporation said in early January that ashtrays will be optional on two new compact sedans, called the Chrysler Cirrus and the Dodge Stratus. In place of the standard-issue ashtray will be an additional cup holder. Telephones and radar detectors will be plugged into an outlet instead of the lighter. The sedans reportedly will be the first mass-market cars without ashtrays as standard equipment in more than 70 years. *See The New York Times* and *ABC World News Tonight*, January 5, 1994; *The Boston Globe*, January 6, 1994.

[33] Birth Defects Foundation Publishes Health Guide

Suggestions are offered for improving the overall health of pregnant women and new mothers, among them "environments free of smoke or hazardous materials," in a new book reportedly just published by the March of Dimes Birth Defects Foundation. The book, entitled "Healthy Babies, Healthy Business: An Employer's Guidebook on Improving Maternal and Infant Health," is intended to guide human resource managers in developing materials and infant health programs in the workplace. *See The New York Times*, January 9, 1994.

MEDIA COVERAGE

[34] "Indoor Air Quality: What Have We Learned?," G.L. Ritter, *Journal of Environmental Regulation*, Winter 1993/94

This article, written by an industrial hygienist, discusses a number of issues related to IAQ problems in nonindustrial workplaces. The author identifies standard IAQ investigation procedures and the sources of many IAQ complaints. He notes that inadequate ventilation and poor HVAC operation and maintenance are frequently to blame for most "sick building" situations. Although "smoke" is mentioned as a possible cause of poor IAQ, ETS is not specifically cited. The article concludes with a brief and cursory discussion of IAQ legislation pending in Congress.

[35] "Preventing Injuries Can be Cheaper than Managing Costs," *The Plain Dealer*, January 4, 1994

Improving indoor air quality is included in what this article calls "the most effective injury-prevention techniques" for employers. "Most indoor air quality problems are easily fixed by changing ventilation," according to the article. It further states that "many office buildings, with the sealants and glues used in furnishings, carpets and wall coverings, cause emissions that can irritate lungs." The article does not mention environmental tobacco smoke.

Other injury-prevention techniques advanced in the article are safety programs, ergonomics improvements, preventive health initiatives and on-site medical clinics.

SCIENTIFIC/TECHNICAL ITEMS

LUNG CANCER

[36] "Dietary Beta Carotene and Lung Cancer Risk in U.S. Nonsmokers," S.T. Mayne, D.T. Janerich, P. Greenwald, S. Chorost, C. Tucci, M.B. Zaman, M.R. Melamed, M. Kiely, and M.F. McKneally, *Journal of the National Cancer Institute* 86(1): 33-38, 1994 [See Appendix A]

Another paper reporting the results of dietary analyses from a large case-control study of lung cancer in nonsmokers has been published. The authors of the study report that consumption of raw fruits and vegetables, vitamin E supplements, and dietary beta carotene are associated with a statistically significant reduction in nonsmoker lung cancer risk.

In contrast to the Alavanja, et al., paper the Mayne, et al., study does not include an investigation of fat consumption. *See* issue 61 of this Report, December 3, 1993. However, the authors note that whole milk consumption was associated with a statistically significant increase in risk, which they suggest might be related to the higher fat content in whole milk versus other varieties of milk.

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